

Recovering Daniel Webster

A Continuing Legal Education Program



Friday, March 7, 2025

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NH Bar Association Seminar Room, Concord

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Faculty

Joel Richard Paul is a professor of law at the University of California Hastings Law School, where he teaches constitutional law, international economic law, and foreign relations law. He has taught at UC Berkeley, Yale, the University of Connecticut, Leiden, and American University. A former Associate Academic Dean for Global Programs, he developed 18 global exchange programs, joint degrees, and an LL.M. program. Paul has also practiced law, worked in politics, and advised the Clinton presidential campaign on trade policy. He has drafted federal trade legislation, challenged the military's exclusion of gay service members, brought First Amendment cases before the U.S. Supreme Court, and testified before Congress. In 1991, he corroborated Anita Hill's testimony during the Clarence Thomas hearings. Paul is the author of *Without Precedent: Chief Justice John Marshall and His Times* and *Unlikely Allies: How a Merchant, a Playwright, and a Spy Saved the American Revolution*, which he adapted into a musical. He writes on American history, international trade policy, globalization, and foreign relations, and is working on a book about 19th-century U.S.-Britain relations. He has lectured and published internationally and studied at Amherst College, the London School of Economics, Harvard Law School, and the Fletcher School of Law and Diplomacy.

Kent M. Barker, Esq., Program Co-Chair is with Hamblett & Kerrigan in Nashua, New Hampshire concentrating in the areas of criminal defense, personal injury, and civil litigation. He has tried many cases before juries in both State and Federal Court. Kent's trial record includes civil jury trials in personal injury cases as well as criminal trials that range from murder indictments to DWI Complaints. He is a graduate of the College of the Holy Cross and received his law degree from Franklin Pierce Law Center. Kent has served the Nashua community in varied roles, including as board member and volunteer of United Way, Big Brothers and Sisters and as a coach for the city of Nashua Recreational Sports Program in various sports. He is 2010 recipient of the Ted Jordan Humanitarian Award given by the Nashua Bar Association. Kent served the Nashua Bar Executive Board from 2011 to 2016 and served as its President in 2013.

Thomas S. Burack, a Shareholder at Sheehan Phinney, practices environmental, energy, real estate, and exempt organizations law. Tom is a graduate of Dartmouth College (1982) and the University of Virginia School of Law (1988), a Fellow in the American College of Environmental Lawyers, and admitted in NH, ME, and VT. Tom served as Commissioner of the NH Dept. of Environmental Services from 2006 through 2016, Law Clerk to the Honorable David H. Souter, Associate Justice, Supreme Court of NH (1988-89), and Legislative Assistant for Environmental Matters to then-U.S. Senator Gordon J. Humphrey (R-NH) (1982-84), and is a Harry S. Truman Scholar. An accomplished storyteller, in 2019 Tom portrayed Daniel Webster in connection with Dartmouth's 200th anniversary celebration of the US Supreme Court's decision in *Trustees of Dartmouth College v. Woodward*. Tom has performed Stephen Vincent Benét's short story *The Devil and Daniel Webster* as a one-man show, assumed the persona of John James Audubon in Chautauqua performances, and been known to recite Robert Service ballads, regale audiences with New England humor, and deliver moose calls.

Hon. Jacalyn A. Colburn was appointed to the New Hampshire Superior Court bench in 2009 and served as the supervisory judge presiding over the Adult Drug Court in Hillsborough County-Southern District until October 2024. She has since retired and now sits part-time as a Senior Active Status Judge. Judge Colburn is a 1982 graduate of UNH's Whittemore School of Business and Economics, where she obtained a B.S. in Business Administration. In 1996, she received her J.D. from Franklin Pierce Law Center and began her legal career as a staff attorney for the New Hampshire Public Defender. In 1998 Judge Colburn became the managing attorney of the organization's Merrimack County office, and in 2000 she was named statewide director of legal services. In addition to representing indigent clients in criminal cases ranging from misdemeanors to homicides, Judge Colburn was responsible for the administration of 10 trial offices, and the supervision of over 100 attorneys before going to the bench. In addition to her judicial duties, Judge Colburn has served as a Trustee and on the Dean's Advisory Council at UNH Franklin Pierce School of Law. She also served for many years as an adjunct professor at the school and coached the school's advanced trial teams at the National Trial Competition. The NH Supreme Court appointed her to the NH Lawyer's Assistance Program Board in 2015 and as co-chair of NH's Russian-American Rule of Law Consortium in 2010. She has served on the NHBA's Professionalism Committee, the Governor's Task Force on Public Sector and Public Interest Law, as a Practical Skills instructor, and as a panelist at a variety of CLE seminars. In 2007 Judge Colburn was named Merrimack County Bar Association Lawyer of the Year, and in 2009 was honored by the New Hampshire Bar Foundation with the Frank Rowe Kennison Award, recognizing her contributions to the betterment of New Hampshire citizens through the administration of justice and the legal profession.

Professor John M. Greabe is a professor of law at the UNH Franklin Pierce School of Law and a law clerk at the U.S. Court of Appeals for the First Circuit. He is the former director of the Warren B. Rudman Center for Justice, Leadership & Public Service at UNH Law. He teaches constitutional law, civil procedure, and related courses. His scholarship focuses on constitutional law, federal courts, and civil rights litigation. Professor Greabe's papers have appeared in several law journals including the Columbia, Virginia, Notre Dame, Boston University, Houston, Buffalo, Vermont, New England, and UNH Law Reviews; Constitutional Commentary; the William & Mary Bill of Rights Journal; the Harvard Law Review Forum; and the Review of Banking and Financial Law. Professor Greabe is admitted to practice before the United States Supreme Court; the United States Courts of Appeals for the First, Seventh, and Eighth Circuits; the United States District Courts for the Districts of New Hampshire and Massachusetts; the New Hampshire Supreme Court; and the Massachusetts Supreme Judicial Court. He previously taught at Vermont Law School.

Jill O'Neill, Program Co-Chair is a mental health professional with over 20 years of experience serving individuals and families seeking recovery services from mental health and substance use disorders. She currently serves as the Executive Director of the New Hampshire Lawyers Assistance Program, supporting members of the New Hampshire legal community experiencing personal or professional well-being challenges. She has uniquely worked alongside legal professionals throughout her career supporting clients and families. Her professional highlights include her work as the co-facilitator of the New Hampshire Justice-Involved Veteran Task Force. She assisted in developing the first "Veterans Behavioral Health Track," a New Hampshire court program aimed to divert justice-involved veterans experiencing service-related injuries into treatment as an alternative to traditional sentencing. Jill accepted an invitation to testify on Capitol Hill to share New Hampshire's model of serving justice-involved veterans. Her involvement in treatment courts includes her previous work as the program manager and court liaison for the Community Connections Program of Greater Nashua Mental Health, where she successfully rebuilt the program, adding enhancements for successful diversion and improved client outcomes. She was awarded the New Hampshire National Alliance on Mental Illness (NAMI) Annual Award in 2016 for making a substantial difference in the criminal justice system to better support individuals experiencing mental health conditions. Jill served on the New Hampshire Legislative Commission, working on expanding mental health courts statewide as the designee for the New Hampshire Community Behavioral Health Association.

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Early Life, Career 1830 to 1852

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Recovering Daniel Webster

How “Godlike Daniel” Became “Black Dan”

By Kent M. Barker

He was the country’s greatest orator in an era when public speaking was the most important skill for a lawyer or politician to have. Thousands of people would travel long distances to hear him enchant a crowd for hours at a time. His legal mind behind many of the early US Supreme Court cases that the American economy and system of jurisprudence rest upon to this day. His remarkable skill in the courtroom was of such renown that it led writers such as Edgar Allan Poe to write “The Telltale Heart” and Steven Vincent Benet to write “The Devil and Daniel Webster.” He was internationally known as both a public speaker and a Statesman. Daniel Webster, who grew up poor on a subsistence farm in Central New Hampshire just before the turn of the 19th Century, became “the Godlike Daniel,” defender of the Constitution and Champion of the Union. Longfellow once called him “the completest man.” The true picture of Webster is more complicated.

The same Daniel Webster of such remarkable skills, talent and accomplishment was also a figure who has gradually diminished through the lens of history during the past 175 years. Once the enemy of the institution of slavery, a practice he denounced with such eloquence during his Plymouth Rock Speech in 1820, he became complicit in the passage of The Missouri Compromise in 1850 and enforcement of the Fugitive Slave Act. His power to persuade remained formidable to the end but the weak underpinning of his arguments could not be hidden by his polished presentations. Webster became a distrusted elitist whose motives were viewed with skepticism. John Quincy Adams, not one to disparage anyone lightly, said of him “the gigantic intellect, the envious temper, the ravenous ambition and the rotten heart of Daniel Webster.”

The questions of how and why Daniel Webster is not considered at the Mount Rushmore level of leaders and Statesmen in U.S. history are not easily answered. His era was crowded with figures of immense political ambition such as Henry Clay and John C. Calhoun who blocked his path to the Presidency that he coveted. The economy of the South was based upon slavery. There would be no easy political solution to the division of North and South. Personal tragedy in Webster's life, the death of four of his five children during his lifetime, brought on bouts of depression. The heartbreaking death of his wife and closest confidante, Grace Fletcher Webster, in 1828 accelerated a descent into extreme behavior. That descent tracks Webster's progressive alcoholism as he transformed from courageous defender of the moral principles of the Declaration of Independence and Constitution to backroom elitist politician all too ready to make a deal for what he thought would serve his own ambition. The heft of his great accomplishments held off the shrinking of his legacy for some time. Scholarly examination for nearly two centuries has slowly revealed more of the truth.

Stage One: Social drinking that progresses to more frequent drinking. "By going back in our own drinking histories, we could show that years before we realized it we were out of control..."

-Alcoholics Anonymous, Twelve Steps and Twelve Traditions, First printing, April 1953

Webster graduated from Dartmouth College in 1801 and decided to then study law. He was deeply impacted by a childhood of near poverty as the youngest of ten children on a subsistence farm in Salisbury, New Hampshire. His father recognized his youngest son's intellectual promise and made the considerable sacrifices necessary to send him to Philips Exeter and then to Dartmouth. Daniel apprenticed at law offices in Salisbury and then Boston before opening an office in Boscawen, NH. He was determined to rise above the poverty of his youth. He married Grace Fletcher, a minister's daughter, and moved to Portsmouth, NH in 1808. Grace and Daniel were well matched. She was pretty and personable but also sharp-witted and capable of challenging her husband when necessary. They had five children during their marriage and Webster later recalled the first years in Portsmouth with Grace as being the happiest of his life.

The demands of a busy law practice often took Webster away from his family as he rode the NH Court Circuit from Courthouse to Courthouse. It is likely that nights spent in Taverns along the way included enjoyment of a drink or more to promote his growing law practice and to no doubt soothe his loneliness. He was known to be friendly, cheerful, and always ready to join into a song around the fire. He also developed into an excellent lawyer. Blessed with an extraordinary memory and the ability to think on his feet, battles with the best legal minds in New Hampshire like Jeremiah Mason and Levi Woodbury revealed the true depth of his talent. His reputation as a top lawyer grew along with his ambition.

On December 22, 1813, the Portsmouth Christmas Fire of 1813 burned the Webster home and devastated his business just after his election to Congress. This event profoundly changed the course of the Webster family life. Grace and Daniel moved to Boston in 1816 to restore the family finances through Daniel's connections with Boston merchants and manufacturers along with the newly met Washington politicians. His absence from the family increased. There is no record of it, but the use of alcohol in his Washington social circle, especially without Grace there to temper his excesses, did not diminish and probably increased. Yet, the next decade was the most productive and accomplished of Webster's career. The Dartmouth College case was argued before the Supreme Court in 1818. The case was decided in Webster's favor protecting the Contracts Clause of the Constitution and the concept of private property. *McCullough v. Maryland* established that the Federal Government had the power to create a Federal Bank. The court in *Gibbons v. Ogden* adopted Webster's proposition that Congress had the right to regulate commerce. These cases were crucial steps in forming the free-market economy success that the US enjoys to this day.

Daniel Webster's speeches from 1820 to 1826 were no less than remarkable events that solidified his reputation as the greatest speaker of this time. He gave a speech at the Bunker Hill Monument in June of 1825 and an address honoring the recently deceased Thomas Jefferson and John Adams in 1826. It was his speech commemorating the Pilgrims landing at Plymouth Rock in 1820 that is remembered as the best of his early speeches for his fierce condemnation of the institution of slavery. Abolitionists memorized his words and admired his courage. This man, they thought, was one of talent, learning and principle. Webster was 38 years old when he gave the speech. He had already built a national reputation and was expected in most minds, including his own, to ascend to a still higher altitude within government. He continued to appear regularly before the U.S. Supreme Court while a congressman and after being elected to the Senate in 1827.

Webster missed his wife and tried to have her and the children with him in Washington as much as possible. Washington D.C. at the time was not a good place to raise five children and Grace spent more time in Boston with them. Webster remained behind to work. He was still afraid of the poverty of his youth but also spent freely as if he were running from it. The rich merchants seemed ready to lend him money and tolerate his failures to pay it back. He soothed his loneliness with fine wine and comfort, convinced of the great things in store for him in the future. His early success, however, did not insulate him from tragedy. His daughter, Gracie dies in 1817. His son Charles died in 1824. Grace and Daniel comforted each other but the Senate and his Supreme Court arguments drew Webster back to Washington for more painful separation from his family. He learned in early January of 1828 that Grace had taken ill and rushed to be at her side, but she passed before he reached her. He was 46 years old and the one person who had always believed in him, even when he did not believe in himself, was gone.

Stage Two: Drinking becomes problematic resulting in extreme behavior even as the subject appears to function normally. “Few indeed are the alcoholics who have any idea of how irrational they are, or seeing their irrationality can bear to face it. Some will be willing to term themselves “problem drinkers” but cannot endure the suggestions that they are in fact mentally ill.”

-Alcoholics Anonymous, 12 and 12, step 2

It will never be known just how deeply the death of his wife impacted Daniel Webster. It is well known that he became depressed and drank with increasing regularity and intensity. Sometime in this time frame, Webster’s attitudes, work and beliefs took a subtle but steady turn. Modern research into alcoholism has discovered a powerful genetic predisposition to alcoholism among people of Scots-Irish descent which Webster was. This gene sets up a systematic expectation of the effect of alcohol within the human body starting from the very first drink. That chemical expectation only strengthens over time and with continued consumption.

A mixed drink known as “The Daniel Webster Punch” became popular in the bar rooms of D.C. in the 1830’s. Many historians deny the existence of any real evidence of Webster’s alcoholism. This omission is likely due to the unwritten rules of the times about hiding the character flaws of the young country’s leaders. They were the celebrities of their era and the US of the Jacksonian period was still looked down upon by European nations as crude and unmannered. The moral failings were hidden, bought off, or simply ignored. The circumstantial evidence of Daniel Webster’s alcoholism, later confirmed by an autopsy performed after his death, leaves little doubt.

The slip into the grip of alcoholism is not a fall off a ledge. It is a long, slow process that takes hold of the sufferer one drink at a time. The death of Grace in 1828 shook Webster but he was still a leading Whig Senator expected by many to lead the country on to a better day. He had opposed the Southern threat of “nullification” whereby John C. Calhoun and the South proposed that any state could choose to strike down or nullify any Federal law that it chose to. Webster’s famous “Second Reply to Hayne” speech in 1830 proclaimed “Liberty and Union, one and inseparable, now and forever.” It is still considered the greatest speech ever given on the Senate floor. Nullification was defeated and Daniel Webster, at least publicly, was at the height of his powers.

Daniel’s private life was less satisfying during the 1830s. He continued to borrow from his wealthy benefactors in Boston while investing in risky land speculation deals in the Midwest. He seemed convinced that his success in the Senate guaranteed that riches would follow, and he could finally be rid of the memory of poverty. Increasingly self-centered and dismissive of all but the highest-ranking legislators and statesmen, he gained the reputation of being less than trustworthy. Webster remarried for money and political power, but the union was not a happy one

and fueled increased alcohol consumption. Other behavior and personal choices deteriorated as each passing year took Daniel further from being the earnest New Hampshire farm boy he once was, humbly discovering his potential at Exeter and Dartmouth.

Webster wanted to be President, and his early success created an expectation. The elections from 1832 to 1844 were disappointments. Elections were different in the 19th century. The path to the nomination required the assistance of many who had seen him up close enough to know his lack of humility. They knew him well enough to know that they did not want to see him hold the power of the Presidency. He was offered the Vice Presidency twice but his pride and resentment over not having been offered the nomination in the first place kept him from service. Had he taken either offer, he would have ascended to the Presidency. He was named Secretary of State, often an “on deck” position for the Presidency, in 1841. The elected President, James K. Polk, abandoned the policies of the Whig party and all the Cabinet resigned in protest. All except Daniel Webster. Webster’s political party became an isolated party of one. It was clear that this was the only party to which he was loyal.

Stage Three: The alcoholic’s drinking has become involuntary and begins to break down his body. “A maladaptive pattern of substance use leading to clinically significant impairment...”
-Diagnostic Statistical Manual of Mental Disorders, 5th Edition, DSM V

The last years of Daniel Webster’s career are more sad than tragic. His contributions to the fabric of the United States are so enormous and enduring that it is difficult to pinpoint where the slide into confusion and incompetence took place. His service as Secretary of State from 1840 to 1843 was sound but failed to get him the Presidential nomination in 1844. He took a tour of the South in 1846 hoping to gain support for a Presidential run, but Southern Whigs found him wanting in integrity and honor. Perhaps worse, there was a sense that Webster did not know or care to know the wants, needs or temper of the average person. The “Black Dan” side of his personality had become sufficiently known to a voting public that his chances of winning were small. He seemed to have forgotten that our Constitution requires that the people elect rather than appoint an elite to be its leader. His behavior became increasingly bizarre. His son, Edward, and dear daughter Julia dies within three months of one another starting in late 1847. Undoubtedly, he dealt with the grief the way his disease told him to.

Daniel Webster was 67 years old when he gave the March 7, 1850 speech giving his endorsement of the Fugitive Slave Act which “saved” the Union but perpetuated slavery. The speech was a glaring reversal of the powerful Plymouth Rock Speech he gave thirty years before. Some historians believe it was an act of sacrifice to preserve the Union with the full knowledge that it was the end of his political career. Others believe Webster was looking to find support in the South for his campaign for the Presidency in 1852. The latter is supported by the fact that he accepted the post of Secretary of State in July of 1850 rather than retire. That term in the Sate

Department was marked by uncharacteristic incoherence and failure. He remained in the position until his death at home in Massachusetts on October 24, 1852. His mind in the last six months was made even more confused by a subdural hematoma he suffered in a carriage accident in May of 1852.

Recovery or Reclamation

The “Recovery” of Daniel Webster is not possible. Only the sufferer of alcoholism can recover. That possibility died with Webster in 1852. Recovery in the historical sense is likewise impossible as there are no new facts being revealed that would tend to exonerate or even explain his later actions. In fact, deeper dives into the facts of his later life only underscore his failings. Today’s “cancel culture” is determined to tear down every statute of a person with a flaw, any flaw, as if erasure and starting anew is the only way to improve the future. The risk is to lose the symbols of the tragic mistakes and lessons of the past. We need reminders or else we forget. The only way to understand our history is to examine it, failures and all, if we are to wisely navigate into our best future. There were no twelve step programs in 1830. There were no grief support groups for a man of 46 who loses his wife to cancer and all but one of his living children before his own death. We will never know how Webster’s life and the country’s history might have been different if those tools had been available to him.

Most reputable historians believe the American Civil War was unavoidable. The institution of slavery was too deeply interwoven into the economy and the culture of the South for one event or one personality to alter the inevitable march to war. They are probably right. If there were one man, however, who might have been able to steer the ship clear of destruction, it would have been a healthy and clear-thinking Daniel Webster. He had the reputation, skills and intellect to make the case that the South’s moral underpinning of its defense of slavery was wrong. Calhoun and Clay may have been giants, but Webster was a worthy opponent. If Webster had made Union AND Liberty rather than just Union the uncompromised objective, the true nature of the conflict would have been laid bare and diplomatic work on a solution may have ensued. He might have spoken, as only he could, for true Liberty and Union, Now and Forever, as the sacred principle of the people of an entire emerging nation and not just what was once the abstract idea of its greatest orator.

No one can recover Daniel Webster but we can reclaim him. The last twenty years of his life are a cautionary tale for today. The pressures, demands, and struggles of the legal profession are real and can often attack the wellness of the very best in a variety of ways. The slide into substance use and abuse has always been a common story among lawyers. Perhaps the legacy of Webster’s later career may be to serve as inspiration, even if it was unintended, for a better, healthier practice of law by members of the bar in the 21st Century. The years between 1830 and 1852 are not the whole story of Daniel Webster. The best part of Webster was molded here in

New Hampshire. He turned failure into triumph and learned the skills that lay the groundwork for a new and prosperous country based on private property, hard work, commerce, fairness and national pride. He was a young boy who worked the fields with his family and earned the chance at an education. He hunted and fished and was educated here. He learned his craft and began his career in Portsmouth with Grace Fletcher Webster and his young children at his side before he belonged to the world.

It is true that Daniel Webster remains accountable for all of his career and not just the triumphs. The true measure of Daniel Webster lies in the context of his times, his struggles, his defects and his extraordinary accomplishments. As much can be said for us all from the highest to those of the most humble origins. A fair, unbiased and complete writing of his life and legacy reveals the remarkable story of a New Hampshire farm boy who held the world spellbound only to lose his way before reaching the top of the mountain. The lessons, so very relevant to today, are there for those who take the effort to examine, embrace and celebrate New Hampshire's most worthy native son.

Chronology of Daniel Webster's Life

1782 – 1852

- 1782** *January 18* Born in Salisbury, New Hampshire
- 1784** *January* Moved to Salisbury Lower Village
- 1786** Witnesses flooding of the Merrimack River
Tutored by Thomas Chase and later by James Tappan and William Hoyt
- 1796** *May 25* Enters Phillips Exeter
December-January Withdraws from Phillips Exeter
- 1797** *Winter* Teaches school in Salisbury
February Studies with Dr. Samuel Wood in Boscawen
Spring Studies Greek with David Palmer, a Dartmouth senior
August Enters Dartmouth and rooms in college dormitory
- 1799** *May* Offers to help finance his brother's education
July 12 Helps found Federal Club at Dartmouth
Temporarily manages the town's newspaper, the *Dartmouth Gazette*
- 1799-1800** Family moves to the Elms Farm, Salisbury, later renamed Franklin
- 1800** *Winter* Teaches school in Salisbury
July 4 Delivers Independence Day address in Hanover
Elected President of United Fraternity
- 1801** *August 26* Graduates from Dartmouth
August Begins study of law with Thomas W. Thompson
- 1802** *January* Teaches school at Fryeburg Academy in Maine
September Returns to Salisbury and resumes legal studies
- 1804** *July 17* Joins his brother in Boston
July 20 Enters law office of Christopher Gore as a student
November 5 Takes three-week trip to New York with Taylor Baldwin
- 1805** *Winter* Refuses offer to be county clerk of the Hillsborough County Court of
Common Pleas, New Hampshire
February Publishes anonymously "An Appeal to the Old Whigs of New Hampshire"
March Admitted to practice before the Suffolk Court of Common Pleas in Boston
March 25 Leaves Boston
April Opens law office in Boscawen
September 3 Argues his first case in court

- 1806** *April 22* Ebenezer Webster, Daniel's father, dies
August 26 Gives State of Literature address to the Phi Beta Kappa Society of Dartmouth College
Writes articles and reviews for the Boston *Monthly Anthology*
- 1807** *May* Admitted as counselor in the superior court of New Hampshire
September Opens law office after moving to Portsmouth
- 1808** *May 29* Marries Grace Fletcher in Salisbury
- 1810** *April 29* Daughter Grace Fletcher Webster born
July 3 Appointed chairman of Portsmouth Committee to write memorial in support of Federalist candidates
- 1811** *June 26* Appointed to three-man committee to revise New Hampshire's criminal code
- 1812** *June 18* War declared against Great Britain
July 4 Speaks before Washington Benevolent Society of Portsmouth and attacks administration's war policy
August 5 Writes Rockingham Memorial, the definitive statement of New England Federalism, and raises specter of disunion
October 7 Nominated for Congress of Federalist ticket
November Elected to lower house of Congress
- 1813** *May 24* Takes his seat in House of Representatives
May 25 Pays respects to President Madison
June 10 Introduces five resolutions to look into origins of war
June 21 Resolutions passed. Webster delivers them to President Madison
July 23 Son Daniel Fletcher Webster born
November Helps Rockingham Bank in Portsmouth obtain charter
December 22 Home in Portsmouth destroyed by fire
- 1814** *January 14* Speaks against enlistment bill
January 14 Admitted to practice before U.S. Supreme Court
March 12 Argues first case before Supreme Court
April 6 Gives first important speech attacking embargo and gains recognition in Congress as a powerful speaker
August 24 British burn Capital and White House
August 29 Reelected to Congress
September 10 Chairman of safety committee and signs notice calling for massing of troops to protect Portsmouth from invasion
December 9 Opposes conscription bill
December 15 Hartford Convention begins
December 24 Treaty of Ghent signed ending War of 1812

- 1815** *January 8* Battle of New Orleans
- 1816** *March 14* Votes against chartering Second Bank of the United States
April 25 Abigail Eastman Webster, Daniel's mother, dies
April Challenged to a duel by John Randolph
August 16 Moves from Portsmouth to Boston but continues as representative from New Hampshire
- 1817** *January 23* Daughter Grace Fletcher Webster dies
September 19 Appears for plaintiff in the *Dartmouth College* case before the New Hampshire superior court
- 1818** *January 16* Daughter Julia born
March 10 Argues *Dartmouth College* case before U.S. Supreme Court
- 1819** *February 2* Wins *Dartmouth College* case
February 22 Argues *McCulloch v. Maryland* case before U.S. Supreme Court
March 7 Wins *McCulloch v. Maryland* case
December 3 Chairs Boston committee opposing expansion of slavery
- 1820** *March 6* Missouri Compromise enacted
July 20 Son Edward born
Summer Conducts John C. Calhoun on a tour of Boston
October 16 Elected a delegate to Massachusetts Constitutional Convention
November 15 Massachusetts Constitutional Convention convenes
December 22 Delivers Plymouth oration
- 1821** *December 31* Son Charles born
- 1821-1824** Argues cases before Spanish Claims Commission
- 1822** *Spring* Elected to Massachusetts General Court and attends for a few days in May and June
November Elected as a Federalist from Boston to lower house of Congress
Recognized as head of the American bar
- 1823** *February 4* Argues *Steamboat* case before U.S. Supreme Court
March 2 Wins *Steamboat* case
August Receives honorary degree from Dartmouth
December 1 Takes his seat in House of Representatives
- 1824** *January 19* Praises Greek independence in House
February 4 Argues *Gibbons v. Ogden* before U.S. Supreme Court
February Fails to reform judiciary
April 1-2 Delivers anti-tariff speech in House
September Discovers Marshfield
November Reelected to House of Representatives

- 1824** *November* Presidential election indecisive and goes to the House of Representatives
December 9-19 Visits Madison and Jefferson
December 19 Son Charles dies
- 1825** *January-February* Assists election of Adams to presidency
February 21 Challenged to a duel by John Randolph
February Challenge withdrawn
June 17 Delivers Bunker Hill oration
June 25-July 28 Visits Niagara Falls
December 22 Assists in extinguishing a fire at the Library of Congress
- 1825-1826** Fails once again to reform judiciary
January 3 His mouthpiece, *Massachusetts Journal*, begins publication
August 2 Delivers eulogy for John Adams and Thomas Jefferson
November 6 Reelected to House of Representatives
- 1826-1828** Assists in efforts to reelect Adams as President
- 1827** *January 6* Elected director of BUS
June 7 Elected to U.S. Senate
December 17 Takes his seat as senator from Massachusetts
- 1828** *January 21* Wife Grace Fletcher Webster dies
May 13 Votes for Tariff of 1828
November Andrew Jackson elected President
December 16-17 Libel suit against Theodore Lowell, Jr., ends with the jury deadlocked
- 1829** *April 10* Brother, Ezekiel, dies
December 12 Marries Caroline Le Roy
- 1830** *January 20* Replies to Senator Robert Y. Hayne in debate over sale of public lands and switches the debate away from public lands
January 26 Makes second reply to Hayne
April 26 Votes for Indian removal
Summer-Autumn Prosecutes John Francis Knapp in murder trial
- 1832** *January 25* Votes against confirmation of Van Buren as minister of England
April 23 Purchases house and property in Marshfield, Massachusetts
May 25-28 Speaks in defense of a bill to recharter the Second Bank of the United States
July 11 Attacks Jackson veto of the Bank bill
November Jackson reelected President
November 24 South Carolina nullifies tariffs
December 17 Denounces nullification

- 1833** *January 16* Reelected to U.S. Senate
February 8-16 Defends Force Bill
February Opposes compromise tariff
March 2 Compromise Tariff of 1833 enacted
Spring-1834 Rumor of Jackson-Webster alliance
May-July 20 Tours New York, Ohio, and Pennsylvania
October 1 Taney orders government deposits removed from BUS
December 21 Requests BUS “refresh” his retainer
- 1834** *March 28* Votes to censure Jackson and Taney; rumors of alliance with Jackson end
Spring Whig party forms
May 7 Denounces Jackson’s Protest message
- 1835** *January 21* Nominated for President by caucus of the Massachusetts legislature
July 6 John Marshall dies
- 1836** *January 22* Attacked by John Quincy Adams
March 15 Fails to block Roger B. Taney confirmation as chief justice
November Van Buren elected President
- 1837** *January 24-26* Argues *Charles River Bridge* case before Supreme Court
February 14 Loses *Charles River Bridge* case
March 17 Onset of financial panic
May 10 New York banks suspend specie payments
May-July Tours Kentucky, Ohio, Illinois, Missouri
- 1838** *March 12-13* Attacks subtreasury bill
- 1839** *January 17* Reelected to U.S. Senate
May 18 Sets sail for Europe
June 2 Arrives in Liverpool
June 6 Arrives in London
June 17 Meets Queen Victoria
July 18 Delivers speech to Royal Agricultural Society at Oxford
August 5 Dines with Queen Victoria
August 6-September 20 (?) Tours England, Wales, and Scotland
September 24 Daughter Julia marries Samuel Appleton in London
October 19 Visits Paris
October 29 Dines with King Louis Philippe at St.-Cloud
November 2 Returns to London
November 22 Departs for New York
December 28 Arrives in New York Harbor

1840	<i>February 10</i>	Grandson Daniel Fletcher Webster, Jr., born
	<i>March-October</i>	Campaigns for Harrison
	<i>November</i>	Harrison elected President
	<i>December 1</i>	Invited to join cabinet
	<i>December 11</i>	Accepts office of secretary of state
1841	<i>February 22</i>	Resigns Senate seat
	<i>February</i>	Assists Harrison in writing of inaugural address
	<i>March 5</i>	Confirmed as secretary
	<i>March 20</i>	Purchases house in Washington
	<i>Spring-Summer</i>	Attempts to win release of Alexander McLeod, accused of murder in the <i>Caroline</i> incident
	<i>April 4</i>	Harrison dies
	<i>August 8</i>	Suffers riding accident
	<i>September 11</i>	Cabinet resigns, except Webster
	<i>November 7</i>	Slaves revolt aboard <i>Creole</i>
	<i>December</i>	British send Lord Ashburton to America to settle several disputes, principally the boundary between the United States and Canada
	1842	<i>April 2</i>
<i>August 9</i>		Webster-Ashburton Treaty signed
<i>August 20</i>		Senate ratifies treaty
<i>September 30</i>		Defends himself in speech in Faneuil Hall
1843	<i>May 8</i>	Writes instructions for China mission
	<i>May 8</i>	Resigns as secretary of state
	<i>June 17</i>	Delivers second Bunker Hill oration
1844	<i>February</i>	Argues and loses <i>Girard</i> case
	<i>February 7</i>	Granddaughter Grace Fletcher Webster dies
	<i>November</i>	James K. Polk elected President
1845	<i>January 16</i>	Reelected to Senate
	<i>March 1</i>	Texas annexed
	<i>September 10</i>	Joseph Story dies
1846	<i>February 9-29</i>	Charged with official misconduct
	<i>May 13</i>	War declared against Mexico
	<i>June 9</i>	Investigating committee dismisses charges of misconduct
	<i>June 15</i>	Oregon Treaty ratified
	<i>July 30</i>	Walker Tariff enacted
	<i>August 8</i>	Wilmot Proviso introduced

1847	<i>January</i>	Argues <i>License</i> case before Supreme Court
	<i>March 6</i>	Loses <i>License</i> case
	<i>April 28-May 29</i>	Tours Virginia, the Carolinas, and Georgia
	<i>September 29</i>	Claims credit for Wilmot Proviso
	<i>September 30</i>	Endorsed for President by Massachusetts Whig convention
	<i>January 23</i>	Son Edward dies
1848	<i>January 24</i>	Argues <i>Luther v. Borden</i> case before Supreme Court
	<i>March 10</i>	Votes against ratification of the Treaty of Guadalupe Hidalgo ending Mexican War
	<i>March 23</i>	Denounces Mexican War in Senate speech
	<i>April 28</i>	Daughter Julia dies
	<i>June 9</i>	Loses nomination of Whig party for President to Zachary Taylor
	<i>November</i>	Taylor elected President
	<i>December</i>	Argues <i>Passenger</i> case before Supreme Court
1849	<i>January</i>	Wins <i>Luther v. Borden</i> case
	<i>February 7</i>	Wins <i>Passenger</i> case
1850	<i>March 7</i>	Delivers speech in Senate favoring compromise
	<i>July 9</i>	Taylor dies
	<i>July 17</i>	Delivers his last speech in the Senate
	<i>July 23</i>	Confirmed as secretary of state in President Millard Fillmore's cabinet
	<i>September 20</i>	Compromise of 1850 enacted
	<i>December 31</i>	Writes Hülsemann letter
1850-1851	Condemned for efforts to enforce Fugitive Slave Law	
1851	<i>February 26</i>	Signs Convention for Settlement of Claims against Portugal
	<i>May 12-June 2</i>	Tours New York
	<i>June 10</i>	Writes instructions for Japan mission
	<i>July 4</i>	Give principal address of laying of cornerstone of new Capitol in Washington
	<i>July 10</i>	Negotiates treaty of amity and commerce with Costa Rica
	<i>September 10</i>	Aids rescue of Louis Kossuth and his associates
	<i>November 13</i>	Apologies to Spain over filibuster attack against Cuba
	<i>December 5</i>	Kossuth arrives in New York
1852	<i>January 7</i>	Speaks at banquet honoring Kossuth and causes breach with Austria
	<i>February 23</i>	Lectures before the New York Historical Society on the importance of history
	<i>March 20-April 2</i>	Argues and wins the <i>Indian Rubber</i> case in U.S. Circuit Court in Trenton, New Jersey, his last important case
	<i>May 8</i>	Sustains severe head injury
	<i>June 16</i>	Signs Convention for the Mutual Delivery of Criminals with Prussia

1852	<i>June 21</i>	Loses nomination of Whig party for President to Winfield Scott
	<i>July 9</i>	Given gargantuan reception in Boston
	<i>July</i>	Mishandles fishing dispute with Britain and denounced in Senate
	<i>June-September</i>	Bungles dispute with Peru over Lobos Islands
	<i>October 21</i>	Signs last will and testament
	<i>October 24</i>	Dies at Marshfield
	<i>October 29</i>	Funeral and burial at Marshfield

Peroration, Dartmouth Case

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**THE UNIVERSITY OF NEW HAMPSHIRE
LAW REVIEW**

Wax, Wick, and Flame: Performing Daniel Webster's
Peroration from the *Dartmouth College* Case

Thomas S. Burack

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Bio of Tom Burack for NHBA Daniel Webster CLE Program, March 7, 2025

Tom Burack, a Shareholder at Sheehan Phinney, practices environmental, energy, real estate, and exempt organizations law. Tom is a graduate of Dartmouth College (1982) and the University of Virginia School of Law (1988), a Fellow in the American College of Environmental Lawyers, and admitted in NH, ME, and VT. Tom served as Commissioner of the NH Dept. of Environmental Services from 2006 through 2016, Law Clerk to the Honorable David H. Souter, Associate Justice, Supreme Court of NH (1988-89), Legislative Assistant for Environmental Matters to then-U.S. Senator Gordon J. Humphrey (R-NH) (1982-84), and is a Harry S. Truman Scholar. An accomplished storyteller, in 2019 Tom portrayed Daniel Webster in connection with Dartmouth's 200th anniversary celebration of the US Supreme Court's decision in Trustees of Dartmouth College v. Woodward. Tom has performed Stephen Vincent Benét's short story *The Devil and Daniel Webster* as a one-man show, assumed the persona of John James Audubon in Chautauqua performances, and been known to recite Robert Service ballads, regale audiences with New England humor, and deliver moose calls.



Thomas S. Burack, Esq.

Wax, Wick, and Flame: Performing Daniel Webster's Peroration from the *Dartmouth College* Case

18 U.N.H. L. REV. 3 (2019)

AUTHOR. Tom Burack, a Shareholder in the law firm of Sheehan Phinney Bass & Green, PA, is a 1982 graduate of Dartmouth College and a 1988 graduate of the University of Virginia School of Law. He served as Commissioner of the New Hampshire Department of Environmental Services (2006-2016). As an accomplished storyteller, Tom has appeared periodically in the personage of Daniel Webster, including for Dartmouth College's 2019 celebration of the 200th Anniversary of the U.S. Supreme Court's decision in *Dartmouth College v. Woodward*.

INTRODUCTION

Daniel Webster was a mere thirty-six years old when he argued and won the Dartmouth College Case before the United States Supreme Court.¹ It was reported that after more than four hours of comprehensive, measured, logical, and well-reasoned legal argument, Webster paused, and then delivered a closing—a “peroration”—so moving that it brought Chief Justice John Marshall to tears.² When Webster finished speaking and sat down, “there was a death-like stillness throughout the room for some moments: every one seemed to be slowly recovering

Compare, Hannah Silverstein, *Arguing the Dartmouth College Case, 200 Years On*, DARTMOUTH NEWS (Feb. 13, 2019), <https://news.dartmouth.edu/news/2019/02/arguing-dartmouth-college-case-200-years> [<https://perma.cc/BM6D-MSC8>] (stating when Webster argued the case), with Richard N. Current, *Daniel Webster American Politician*, ENCYCLOPEDIA BRITANNICA (last accessed Sept. 21, 2019), <https://www.britannica.com/biography/Daniel-Webster> [<https://perma.cc/HP2Y-JL4Y>] (stating when Webster was born).

See generally, Richard N. Current, “It Is...A Small College...Yet, There Are Those Who Love It” *Dartmouth College v. Woodward*, AMERICAN HERITAGE (last accessed Sept. 21, 2019) <https://www.americanheritage.com/it-small-college-yet-there-are-those-who-love-it> [<https://perma.cc/4A85-T2KE>].

himself, and coming gradually back to his ordinary range of thought and feeling.”³ And so began the legend and the mythology of Daniel Webster’s peroration in the *Dartmouth College* Case. Legend because, propelled in no small measure by this victory, over his lifetime Daniel Webster argued more than 200 cases before the U.S. Supreme Court, many of which helped to shape the new nation’s understanding of its Constitution.⁴ Mythology because there was not and is not an official transcript of this argument.⁵ One certainty, however, is that Webster had delivered a similar peroration when he unsuccessfully argued the case before the Superior Court in New Hampshire in 1817, and that his efforts to draw tears from the bench were met at that time with derision and satire by the Republican-dominated press in New Hampshire.⁶

Shortly after arguing the case in 1818 in Washington, in an era in which cases were not “briefed” in advance to the Supreme Court and contemporaneous transcripts of arguments were not made, Webster took the unprecedented step of privately printing the “minutes” of his argument “without title or name to it.”⁷ Although it was his original intention to keep the “three or four copies” under his own “lock and key” and only to lend them out a day at a time—“precautions . . . taken to avoid the indecorum of publishing the creature”—the number of copies in circulation quickly grew and, through a sympathetic Justice Joseph Story and other avenues, eventually made their way into the hands of the full court.⁸ While Webster’s printed version is quite comprehensive, it does not include the peroration. As he wrote to Jeremiah Mason, one of his co-counsel in arguing the case before New Hampshire’s highest court, “They are hastily written off, with much abbreviation, and contain little else than quotation from the cases. All the nonsense is left out.”⁹ Concluded one of Webster’s biographers, “He purposely left out his

³ Richard W. Morin, *Will to Resist: The Dartmouth College Case*, DARTMOUTH ALUMNI MAGAZINE (Apr. 1969) (quoting Chauncey A. Goodrich).

⁴ Scott Bomboy, *Daniel Webster’s Unique Supreme Court Legacy*, CONSTITUTION DAILY, (Jan. 18, 2019), <https://constitutioncenter.org/blog/daniel-websters-unique-supreme-court-legacy> [<https://webarchive.loc.gov/all/20180527181951/https://constitutioncenter.org/blog/daniel-websters-unique-supreme-court-legacy>].

⁵ Morin, *supra* note 3.

⁶ IRVING H. BARTLETT, DANIEL WEBSTER 77–79 (W.W. Norton & Company, Inc., 1978).

⁷ Morin, *supra* note 3 (citing Webster’s letter to Mason, April 22, 1818).

⁸ *Id.*

⁹ Letter from Daniel Webster to Jeremiah Mason, April 23, 1818, reprinted in WILTSE, C., ED., THE PAPERS OF DANIEL WEBSTER, CORRESPONDENCE, VOL. 1 1798–1824, 224 (University Press of New England, 1974).

peroration because it embarrassed him. It lacked legal reasoning.”¹⁰

Curiously though, ever since his death in 1852,¹¹ the words of Daniel Webster’s peroration, the words that many believe entitle him to be known as the “re-founder” of Dartmouth College, have tripped regularly from the tongues of generation after generation of Dartmouth students and graduates: “It is, Sir, as I have said . . . a small college, and yet, there are those who love it.”¹² Or at least, that’s what everyone believes that he said. Of the many people who officially eulogized Webster, one was U.S. Senator Rufus Choate of Massachusetts, a member of the Dartmouth Class of 1819, and long a friend and admirer of Webster’s.¹³ Choate had learned that Chauncey Goodrich, then a Professor of Oratory at Yale University, had attended the Supreme Court argument on that day in 1818 on behalf of his employer, which took more than a passing interest in the case and its potential implications for other private eleemosynary educational institutions. Mourning Webster’s passing, Choate wrote to Goodrich and asked if he had any materials relating to the argument that he might use in a eulogy of Webster. This inquiry prompted Goodrich to write back and share his recollections from some thirty-four years earlier of Webster’s peroration. But were Goodrich’s recollections built on actual notes that he may have taken on the day of argument in 1818 or on his memory more than three decades later of what by then had already become known as a legendary performance that had become part of the country’s folklore?¹⁴ Further complicating the picture, in the middle of his “account” that appears at first to take the form of a verbatim transcript, Goodrich included three paragraphs in which he describes Webster’s emotional state after delivering his famous line about loving a small college. Describing a Webster whose “lips quivered[,] . . . firm cheeks trembled with emotion[,] . . . eyes [] filled with tears[, and] voice choked,” Goodrich explains, “I will not attempt to give you the few broken words of tenderness in which he went on to

¹⁰ ROBERT V. REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* 159 (W.W. Norton & Company, 1997).

¹¹ Richard N. Current, *Daniel Webster American Politician*, *ENCYCLOPEDIA BRITANNICA* (last accessed Sept. 21, 2019), <https://www.britannica.com/biography/Daniel-Webster> [<https://perma.cc/HP2Y-JL4Y>].

¹² Alex Fredman, *For the College on the Hill*, *THE DARTMOUTH* (Oct. 6, 2017, 1:55 AM), <https://www.thedartmouth.com/article/2017/10/> [<https://perma.cc/LBK3-RVRH>].

¹³ Rufus Choate, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS* (last accessed Oct. 25, 2019) <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000375> [<https://perma.cc/PXF9-4T6T>].

¹⁴ REMINI, *supra* note 10 at 159.

speak of his attachment to the college.”¹⁵ Is it possible that Goodrich was so moved by what he was hearing that he could not autonomously transcribe words to paper, as he, too, had to pause to put a handkerchief to his eyes? We will never know the answer to these questions and, consequently, we will never be able to fully separate fact from fiction, actual utterances from myths.

As an undergraduate at Dartmouth in the late 1970s and early 1980s, I regularly sat in Thayer Dining Hall where what seemed like a more than life-sized painting of Webster arguing the case before the Supreme Court adorned the wall and included his attestation of love for his small college. I simultaneously filled my stomach and absorbed his words. I became a storyteller during my undergraduate years, and later performed from memory Stephen Vincent Benét’s short story, “The Devil and Daniel Webster,” for audiences across New Hampshire. Evidently those performances left a lasting impression, for in about 2016 I took a call from New Hampshire Supreme Court Associate James (Jim) Bassett, Dartmouth Class of 1978, and a longtime friend.

Justice Bassett explained that he had been asked by the College’s Office of Alumni Affairs to serve as the Chair of the Planning Committee for the celebration of the 200th anniversary of the US Supreme Court’s decision in the *Dartmouth College* Case, which would coincide with the 250th anniversary celebration of the founding of the College by Eleazar Wheelock in 1769. Jim, himself a Webster admirer who keeps a portrait of Black Dan on the wall in his Chambers, recalled that he had seen me perform as Daniel Webster at a dinner meeting many years earlier of the Merrimack County Bar Association and asked if I would consider again portraying Daniel Webster by this time reenacting a portion of his argument that saved the College from becoming Dartmouth University. Jim didn’t have to make a hard sell—Webster is a fascinating and remarkable historical figure, and the opportunity to again bring his words to life was irresistible to me.

Long a Webster fan myself, years ago I purchased the complete sixteen volume collection of his papers published for Dartmouth by the University Press of New England. So, I went to the shelf, pulled down the first volume on his federal practice, and found the passage that appears below. I chose to focus on the 275 words that Goodrich put in quotation marks and to take a dramatic pause where Webster gushed out his “feelings.” Hours spent memorizing and rehearsing, whether in front of a mirror or while walking my dog, brought the words of the peroration so close that they began to feel like they were living through me. On one early morning walk, through a seemingly unstoppable torrent of words and coordinated gestures, I suddenly felt that I had broken the code, that I had a way of understanding

¹⁵ Morin, *supra* note 3 (quoting Chauncey A. Goodrich).

Webster's peroration not just as a string of sentences that reinforced reason with emotions, but as a moving picture in which the College was an actual and metaphorical candle which could be held in its holder in my right hand—a "great light of science" which could "throw its radiance over our land"¹⁶—but which, when held up close to my mouth, could be "put out" if I held my left hand behind the flame, puffed out my cheeks, and blew so as to extinguish the flame. For me, this became the central image of the peroration: a story of wax, wick, and flame, a very simple, elemental story of keeping the candle burning, even when other "sons" were turning against Webster's metaphorical Cesar as candle and trying to "put it out." Before resting his case, my Webster extends his right hand proudly before him toward the Supreme Court Justices, tenderly cradles the candle that still glows and throws its radiance across the room, and reminds the jurists that he would never turn against the College he loves, so that she could never say of him, "Et tu quoque mi fili,"¹⁷ or, in English, "And thou, too, my son."

Webster's message was not lost on the Justices, who also chose not to assassinate their mothers. When Chief Justice John Marshall announced and read the court's decision on February 2, 1819, the 6-1 majority signaled that the Court not only would not blow out the candle that was Dartmouth College, it would encourage the lighting of many, many more.¹⁸ I was honored to have had the opportunity to present Daniel Webster's words, but in many ways I felt that once I discovered Webster's candle, the peroration performed itself 200 years after it first was delivered. We'll never know what really was said or what gestures were actually used by Webster. And that's okay. Sometimes myths are just as good as and even more powerful than precise words, for myths live in hearts, while words live in books. And as myths go, few are easier to picture and understand than wax, wick, and flame.

¹⁶ Daniel Webster, Peroration, The Dartmouth College Case (Mar. 10, 1818).

¹⁷ Latin scholars would not recognize this as proper Latin; at a minimum, "fili" should be "filius," since the former is the plural and the latter is the singular. The reader is left to wonder whether the error was Webster's or Chauncey's, and what was actually said before the Court. Likewise, it's not clear whether Webster only spoke the line in Latin, or whether he also provided the translation, as I did in my rendition. Did all of the Justices know Latin so well that they understood what Webster had (ungrammatically) just said, or did they need a translation? Or, because practically everyone at that time would have known the story of Caesar's betrayal, was the message obvious, even without a translation?

¹⁸ Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 598 (1819) ("The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college, and all the literary institutions of the country.").

**DARTMOUTH COLLEGE V. WOODWARD, DANIEL WEBSTER'S PERORATION,
MARCH 10, 1818**

"*This, Sir, is my case!* It is the case not merely of that humble institution, it is the case of every college in our Land! It is more! It is the case of every eleemosynary institution throughout our country—all of those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of life! It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped, for the question is simply this, 'Shall our State Legislatures be allowed to take *that which is not their own*, to turn it from its original use and apply it to such ends and purposes as they in their discretion shall see fit!'

Sir, you may destroy this little institution; it is weak, it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out! But if you do so, you must carry through your work! You must extinguish, one after another, all those great lights of science which for more than a century have thrown their radiance over our land! It is, Sir, as I have said, a small college. And yet *there are those who love it!*" [Here the feelings which he had thus far succeeded in keeping down, broke forth. His lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears; his voice choked; and he seemed struggling to the utmost, simply to gain that mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give the few broken words of tenderness in which he went on to speak of his attachment to the college. It seemed to be mingled throughout with the recollections of father, mother, brother, and all the trials and preventions through which he had made his way into life. Every one saw that it was wholly unpremeditated—a pressure on his heart which sought relief in words and tears. Recovering himself, after a few moments, and turning to Judge Marshall, he said,]

"Sir, I know not how others may feel, (glancing at the opponents of the college before him), but for myself, when I see my *Alma Mater* surrounded like Cesar in the senate house, by those who are reiterating stab upon stab, I would not for this right hand have her say to me, '*Et tu quoque, mi fili!*'"¹⁹

¹⁹ Retyped from THE PAPERS OF DANIEL WEBSTER, LEGAL PAPERS, VOL. 3, THE FEDERAL PRACTICE, PART I 153–154 (Andrew J. King, ed., 1989) (citing Extract. MB. Chauncey A. Goodrich to Rufus Choate, November 25, 1852).

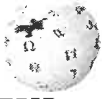
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Impact of Webster's Supreme Court Cases

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Dartmouth College v. Woodward

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), was a landmark decision in United States corporate law from the United States Supreme Court dealing with the application of the Contracts Clause of the United States Constitution to private corporations. The case arose when the president of Dartmouth College was deposed by its trustees, leading to the New Hampshire legislature attempting to force the college to become a public institution and thereby place the ability to appoint trustees in the hands of the governor of New Hampshire. The Supreme Court upheld the sanctity of the original charter of the college, which predated the creation of the State.^[1]

The decision settled the nature of public versus private charters and resulted in the rise of the American business corporation and the American free enterprise system.^[2]

Background

In 1769, King George III of Great Britain granted a charter to Dartmouth College that spelled out the purpose of the school, set up the structure to govern it, and gave it land. In 1816, over 30 years after the conclusion of the American Revolution, the New Hampshire legislature altered Dartmouth's charter in order to reinstate the College's deposed president, place the ability to appoint positions in the hands of the governor, add new members to the board of trustees, and create a state-controlled board of visitors with veto power over trustee decisions. This effectively converted the school from a private to a public institution. The College's book of records, corporate seal, and other corporate property were removed. The trustees of the College objected and sought to have the actions of the legislature declared unconstitutional.

Trustees of Dartmouth College v. Woodward



Supreme Court of the United States

Decided February 25, 1819

Full case name *Trustees of Dartmouth College v. Woodward*

Citations 17 U.S. 518 (<https://supremecourt.us/17/518/case.html>) (*more*)

4 Wheat. 518; 4 L. Ed. 629

Case history

Prior Error to the New Hampshire Superior Court

Holding

The charter granted by the British crown to the trustees of Dartmouth College, in New-Hampshire, in the year 1769, is a contract within the meaning of that clause of the constitution of the United States, (art. 1. s. 10.) which declares that no State shall make any law impairing the obligation of contracts. The charter was not dissolved by the revolution.

Court membership

Chief Justice

John Marshall

Associate Justices

Bushrod Washington · William Johnson
H. Brockholst Livingston · Thomas Todd
Gabriel Duvall · Joseph Story

Case opinions

The trustees retained Dartmouth alumnus Daniel Webster, a New Hampshire lawyer who later became a U.S. Senator for Massachusetts and Secretary of State under President Millard Fillmore. Webster argued the college's case against William H. Woodward, the state-approved secretary of the new board of trustees. Webster's speech in support of Dartmouth (which he called "a small college," adding, "and yet there are those who love it") was reportedly so moving that it helped convince Chief Justice John Marshall and almost brought Marshall to tears, according to the later recollection of attendant Chauncey A. Goodrich.^[3]

Majority	Marshall, joined by Johnson, Livingston
Concurrence	Washington, joined by Livingston
Concurrence	Story, joined by Livingston
Dissent	Duvall
	Todd took no part in the consideration or decision of the case.
	Laws applied
	U.S. Const. Art. 1, Sec. 10

Judgment

The decision, handed down on February 2, 1819, ruled in favor of the college and invalidated the act of the New Hampshire Legislature, which in turn allowed Dartmouth to continue as a private institution and take back its buildings, seal, and charter. The majority opinion of the court was written by Marshall. The opinion reaffirmed Marshall's belief in the sanctity of a contract (also seen in Fletcher v. Peck^[4]) as necessary to the functioning of a republic (in the absence of royal rule, contracts rule).

The Court ruled that the college's corporate charter qualified as a contract between private parties, the King and the trustees, with which the legislature could not interfere. Even though the United States were no longer royal colonies, the contract was still valid because the Constitution said that a state could not pass laws to impair a contract. The fact that the government had commissioned the charter did not transform the school into a civil institution. Marshall's opinion emphasized that the term "contract" referred to transactions involving individual property rights, not to "the political relations between the government and its citizens."^[5]

Significance

The decision was not without precedent; the Court had invalidated a state act in Fletcher v. Peck (1810),^[4] concluding that contracts, no matter how they were procured (in that case, a land contract had been illegally obtained), cannot be invalidated by state legislation. Fletcher was not a popular decision at the time, and a public outcry ensued. Thomas Jefferson's earlier commiseration with New Hampshire Governor William Plumer stated essentially that the earth belongs to the living. Popular opinion influenced some state courts and legislatures to declare that state governments had an absolute right to amend or repeal a corporate charter. The courts, however, have imposed limitations on this.

After the Dartmouth decision, many states wanted more control, so they passed laws or constitutional amendments giving themselves the general right to alter or revoke at will, which the courts found to be a valid reservation.^{[6][7]} But the courts had established that the alteration or revocation of private

charters or laws authorizing private charters must be reasonable and cannot cause harm to the members (founders, stockholders, and the like).^{[8][9][10]}

The traditional view is that this case is one of the most important Supreme Court rulings, strengthening the Contracts Clause and limiting the power of the States to interfere with private charters, including those of commercial enterprises.^[11]


See also

- United States corporate law
- Dartmouth College
- John Marshall
- Contract Clause
- Special district (United States)
- Pennsylvania College Cases 80 U.S. 190 (1871)
- Case of Sutton's Hospital (1612) 77 Eng Rep 960
- Phillips v Bury, 1 Ld Raym 5; 2 TR 346, Lord Holt
- Attorney-General v Pearce, 2 Atk 87, Lord Hardwicke
- John Wheelock

Notes

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7. Pennsylvania College Cases, 80 U.S. (13 Wall.) 190 (<https://supreme.justia.com/cases/federal/us/80/190/>) (1871).
8. Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (<https://supreme.justia.com/cases/federal/us/13/43/>) (1815).
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External links

-  Works related to *Trustees of Dartmouth College v. Woodward* at Wikisource
 - Text of *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) is available from:
CourtListener (<https://www.courtlistener.com/opinion/85282/dartmouth-college-v-woodward/>)
Findlaw (<https://caselaw.findlaw.com/us-supreme-court/17/518.html>) Justia (<https://supreme.justia.com/cases/federal/us/17/518/>) Library of Congress (<http://cdn.loc.gov/service/ll/usrep/usrep017/usrep017518/usrep017518.pdf>) OpenJurist (<https://openjurist.org/17/us/518>) Oyez (oral argument audio) (<https://www.oyez.org/cases/1818/0>)
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Gibbons v. Ogden

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), was a landmark decision of the Supreme Court of the United States which held that the power to regulate interstate commerce, which is granted to the US Congress by the Commerce Clause of the US Constitution, encompasses the power to regulate navigation.^{[1][2]} The decision is credited with supporting the economic growth of the antebellum United States and the creation of national markets. *Gibbons v. Ogden* has since provided the basis for Congress' regulation of railroads, freeways and television and radio broadcasts.^[3]

The case was argued by some of America's most admired and capable attorneys at the time. The exiled Irish patriot Thomas Addis Emmet, as well as Thomas J. Oakley, argued for Ogden, and U.S. Attorney General William Wirt and Daniel Webster argued for Gibbons.

Background

In 1798, the New York State Legislature granted to Robert R. Livingston and Robert Fulton exclusive navigation privileges of all the waters within the jurisdiction of that state with boats moved by fire or steam for a term of 20 years. Livingston and Fulton subsequently also petitioned other states and territorial legislatures for similar monopolies in the hope of developing a national network of steamboat lines, but only the Orleans Territory accepted their petition; it awarded them a monopoly on the lower Mississippi River.^[4]

Aware of the potential of the new steamboat navigation, competitors challenged Livingston and Fulton by arguing that the commerce power of the federal government was exclusive and superseded state laws. Legal challenges followed, and in response, the

Gibbons v. Ogden



Supreme Court of the United States

Argued February 5, 1824

Decided March 2, 1824

Full case name *Thomas Gibbons, Appellant v. Aaron Ogden, Respondent*

Citations 22 U.S. 1 (<https://supreme.justia.com/us/22/1/case.html>)
(*more*)

9 Wheat. 1; 16 L. Ed. 23; 1824 U.S. LEXIS 370

Case history

Prior Appeal from the Court for the Trial of Impeachments and Correction of Errors of the State of New York

Holding

The New York law is invalid because the Commerce Clause of the Constitution designates power to Congress to regulate interstate commerce, and the broad definition of commerce includes navigation.

Court membership

Chief Justice

John Marshall

Associate Justices

Bushrod Washington · William Johnson

Thomas Todd · Gabriel Duvall
Joseph Story · Smith Thompson

Case opinions

monopoly attempted to undercut its rivals by selling them franchises or buying their boats. Former New Jersey Governor Aaron Ogden had tried to defy the monopoly but ultimately purchased a license from a Livingston and Fulton assignee in 1815 and entered business with Thomas Gibbons from Georgia. The partnership collapsed three years later, however, when Gibbons operated another steamboat on Ogden's route between Elizabeth-town, New Jersey (now Elizabeth), and New York City, which had been licensed by the US Congress under a 1793 law regulating the coasting trade.^[5] The partners ended up in the New York Court for the Trial of Impeachments, which granted a permanent injunction against Gibbons in 1820.^[4]

Majority	Marshall, joined by Washington, Todd, Duvall, Story
Concurrence	Johnson
	Thompson took no part in the consideration or decision of the case.
	Laws applied
	U.S. Const. art. I sec. 8 clause 3

Case

Ogden filed a complaint in the Court of Chancery of New York to ask the court to restrain Gibbons from operating on those waters. Ogden's lawyer contended that states often passed laws on issues regarding interstate matters and should have fully-concurrent power with Congress on matters concerning interstate commerce.

Gibbons's lawyer, Daniel Webster, however, argued that Congress had exclusive national power over interstate commerce according to Article I, Section 8, Clause 3, of the US Constitution and that to argue otherwise would result in confusing and contradictory local regulatory policies. The Court of Chancery of New York and the Court of Errors of New York found in favor of Ogden and issued an injunction to restrict Gibbons from operating his boats.

Gibbons appealed to the Supreme Court and argued, as he had in New York, that the monopoly conflicted with federal law. After several delays, the court began discussing the meaning of the commerce clause in 1824, which had now become an issue of wider interest. Congress was debating a bill to provide a federal survey of roads and canals.^[6]

Southerners, in particular, were growing more sensitive to what result a holding for exclusive federal jurisdiction over commerce would mean to them as sectional disputes, especially over slavery, were increasing.^[4] Just 18 months prior to oral arguments in the *Gibbons v. Ogden* case, the people of Charleston, South Carolina, had been dismayed at the revelation of Denmark Vesey's plotted slave revolt. The statehouse quickly followed up the preemptive suppression of the rebellion with the Negro Seamen Act, which required free black sailors on ships coming into the state to be jailed for the duration of the ship's stay in port. The act was promptly struck down as unconstitutional by Associate Justice Johnson, who was riding federal circuit, on the ground that the act violated commercial treaty provisions with the United Kingdom. South Carolina emphatically rejected Johnson's holding, and talk quickly emerged of nullification and violent disunion. To thread the needle in the *Gibbons* case, the Court would need to deliver a holding that both defended national power over interstate commerce but did not eradicate state police powers, which Southern whites viewed as vital to their very survival.

Decision of Supreme Court

The Supreme Court ruled in favor of Gibbons on the grounds that Congress has the right to regulate interstate commerce. The sole decided source of Congress's power to promulgate the law at issue was the Commerce Clause. Accordingly, the Court had to answer whether the law regulated "commerce" that was "among the several states." With respect to "commerce," the Court held that commerce is more than mere traffic and is the trade of commodities, a broader definition that includes navigation. The Court interpreted "among" to mean "intermingled with:"

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

The part of the ruling that stated that any license granted under the Federal Coasting Act of 1793 takes precedence over any similar license granted by a state is also in the spirit of the Supremacy Clause although the Court did not specifically cite that clause.

The Court did not discuss the argument pressed for Gibbons by U.S. Attorney General Wirt that the federal patent laws pre-empted New York's patent grant to Fulton and Livingston.^[7] That question remained undecided for the next 140 years until the Supreme Court held in Sears, Roebuck & Co. v. Stiffel Co. (1964) that federal patent law pre-empted similar state laws.

Excerpts

- The power to "regulate Commerce" is:

the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

- In interpreting the power of Congress as to commerce "among the several states":

The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior ... Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.

- Defining how far the power of Congress extends:

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States."

See also

- [List of United States Supreme Court cases, volume 22](#)

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7. Marshall, however, wrote in the last two sentences of his opinion, "I have not touched upon the right of the States to grant patents for inventions or improvements generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision if they cannot exercise it so as to restrain free intercourse among the States." 221 U.S. at 239.

Further reading

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External links

- Text of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) is available from: CourtListener (<https://www.courtlistener.com/opinion/85412/gibbons-v-ogden/>) Google Scholar (https://scholar.google.com/scholar_case?case=1173503503763993716) Justia (<https://supreme.justia.com/cases/federal/us/22/1/>) Library of Congress (<http://cdn.loc.gov/service/ll/usrep/usrep022/usrep022001/usrep022001.pdf>) OpenJurist (<https://openjurist.org/22/us/1>) Oyez (oral argument audio) (<https://www.oyez.org/cases/1789-1850/22us1>)
- *Gibbons v. Ogden*, Law, and Society in the Early Republic (<http://www.ohioswallow.com/book/Gibbons+v.+Ogden,+Law,+and+Society+in+the+Early+Republic>)
- The short film *Gibbons v. Ogden* (1977) (<https://archive.org/details/gov.ntis.AV010230VM00>) is available for free viewing and download at the Internet Archive.
- Summary of *Gibbons v. Ogden* (<https://web.archive.org/web/20120306011711/http://www.lawnix.com/cases/gibbons-ogden.html>)

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McCulloch v. Maryland

McCulloch v. Maryland,^[a] 17 U.S. (4 Wheat.) 316 (1819), was a landmark U.S. Supreme Court decision that defined the scope of the U.S. Congress's legislative power and how it relates to the powers of American state legislatures. The dispute in *McCulloch* involved the legality of the national bank and a tax that the state of Maryland imposed on it. In its ruling, the Supreme Court established firstly that the "Necessary and Proper" Clause of the U.S. Constitution gives the U.S. federal government certain implied powers necessary and proper for the exercise of the powers enumerated explicitly in the Constitution, and secondly that the American federal government is supreme over the states, and so states' ability to interfere with the federal government is restricted.^{[3][4]} Since the legislature has the authority to tax and spend, the court held that it therefore has authority to establish a national bank, as being "necessary and proper" to that end.

The state of Maryland had attempted to impede an operation by the Second Bank of the United States through a tax on all notes of banks not chartered in Maryland. Though the law, by its language, was generally applicable to all banks not chartered in Maryland, the Second Bank of the United States was the only out-of-state bank then existing in Maryland, and the law was thus recognized in the court's opinion as having specifically targeted the Bank of the United States. The Court invoked the Necessary and Proper Clause of the Constitution, which allows the federal government to pass laws not expressly provided for in the Constitution's list of enumerated powers of Congress if such laws are necessary and proper to further the powers expressly authorized.

McCulloch has been described as "the most important Supreme Court decision in American history defining the scope of Congress's powers and delineating the

McCulloch v. Maryland



Supreme Court of the United States

Argued February 21 – March 3, 1819

Decided March 6, 1819

Full case name *James McCulloch v. The State of Maryland, John James*^[a]

Citations 17 U.S. 316 (<https://supreme.justia.com/us/17/316/case.html>)
(*more*)

4 *Wheat.* 316; 4 *L. Ed.* 579; 1819 U.S. LEXIS 320; 4 A.F.T.R. (P-H) 4491; 42 *Cont. Cas. Fed.* (CCH) ¶ 77,296

Case history

Prior Judgment for John James, Baltimore County Court; affirmed, Maryland Court of Appeals

Subsequent None

Holding

Although the Constitution does not specifically give Congress the power to establish a bank, it delegates the ability to tax and spend.

Because a bank is a proper and suitable instrument to assist the operations of the government in the collection and disbursement of the revenue, and because federal laws are supreme over state laws, Maryland had no power to interfere with the bank's operation by taxing it. Maryland Court of Appeals reversed.

Court membership

relationship between the federal government and the states."^[5] The case established two important principles in constitutional law. First, the Constitution grants to Congress implied powers to implement the Constitution's express powers to create a functional national government. Prior to the Supreme Court's decision in *McCulloch*, the scope of the U.S. government's authority was unclear.^[3] Second, state action may not impede valid constitutional exercises of power by the federal government.

Chief Justice

John Marshall

Associate Justices

Bushrod Washington · William Johnson
H. Brockholst Livingston · Thomas Todd
Gabriel Duvall · Joseph Story

Case opinion

Majority Marshall, joined by *unanimous*

Laws applied

U.S. Const. art. I, § 8, cl. 1, 18

Background

Almost immediately after the ratification of the U.S. Constitution in 1788, a major public debate arose over whether to establish a national bank for the United States.^[6] Upon George Washington's inauguration in 1789 as the first President of the United States, his Secretary of the Treasury, Alexander Hamilton, proposed creating a national bank to regulate American currency and deal with national economic problems.^[6] Washington's Secretary of State, Thomas Jefferson, strongly opposed the bank's creation, fearing it would usurp power from the individual states and concentrate it to a dangerous degree in the central federal government.^[6] Congress created the First Bank of the United States in 1791 with a 20-year charter, but the issue continued to be controversial. Those who supported Hamilton's vision of a stronger central government eventually formed the Federalist Party, while those who opposed him and supported Jefferson's vision of a decentralized government that focused on states' rights formed the Democratic-Republican Party.



A handwritten bank draft from the Second Bank of the United States, dated July 24, 1824, from Daniel Webster, who argued on behalf of McCulloch and the U.S. government in *McCulloch v. Maryland*

The First Bank's charter expired in 1811 and was not renewed. However, national economic problems in the aftermath of the War of 1812 prompted Congress to pass similar legislation in 1816 to create the Second Bank of the United States.^[7] The U.S. government only owned 20 percent of the bank's equity, and many state governments resented the bank for calling in loans it had made to them.^[7] Consequently, some states passed laws designed to hinder the bank's operation, while others simply tried to tax it.^[7] In 1818, the Maryland General Assembly—Maryland's state legislature—passed a law levying a \$15,000 annual tax on any bank operating in Maryland that was issuing notes and bills that were not properly stamped by Maryland's Treasury, the Western Shore Treasury.^[8]

James William McCulloch^[b], a cashier of the Baltimore Branch of the Second Bank of the United States, issued unstamped bank notes to Baltimore resident George Williams.^[10] The lawsuit was filed by John James, an informer who sought to collect half of the fine, as provided for by the statute.^[8] The Bank was represented by Daniel Webster. The case was appealed to the Maryland Court of Appeals, where the state of Maryland argued that "the Constitution is silent on the subject of banks." It was Maryland's contention that without specific constitutional authorization for the federal government to create a bank, any such creation would be rendered unconstitutional.

The court upheld Maryland. The case was then appealed to the Supreme Court.

Decision

The Court determined that Congress had the power to create the Bank. Chief Justice Marshall supported his conclusion with four main arguments:^[11]

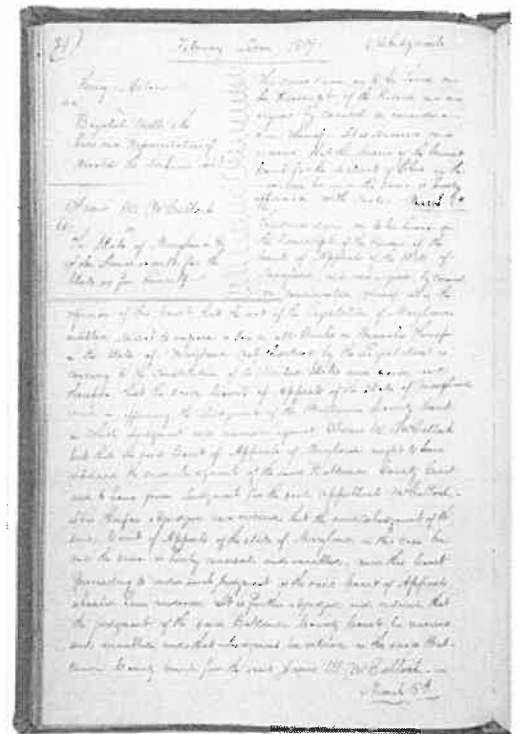
Firstly, he argued that historical practice established Congress's power to create the bank. Marshall invoked the creation of the First Bank of the United States in 1791 as authority for the constitutionality of the second bank.^[11] The first Congress had enacted the bank after great debate, and it was approved by an executive "with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast."^[12]

Secondly, Marshall rebutted the argument that states retain ultimate sovereignty because they ratified the constitution: "The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion."^[13] Marshall contended that it was the people who ratified the Constitution and thus the people, not the states, who are sovereign.^[11]

Thirdly, Marshall addressed the scope of congressional powers under Article I. The Court broadly described Congress's authority before it addressed the Necessary and Proper Clause.^[11] Marshall admitted that the Constitution does not enumerate a power to create a central Bank but said that is not dispositive as to Congress's power to establish such an institution:^[11] "In considering this question, then, we must never forget, that it is a *constitution* we are expounding."^[14]

Fourthly, Marshall supported his opinion textually by invoking the Necessary and Proper Clause, which permits Congress to seek an objective while it exercised its enumerated powers as long as that objective is not forbidden by the Constitution. In liberally interpreting the Necessary and Proper Clause, the Court rejected Maryland's narrow interpretation of the clause that the word "necessary" in the clause meant that Congress could pass only laws that were absolutely essential in the execution of its enumerated powers. The Court rejected that argument, on the grounds that many of the enumerated powers of Congress under the Constitution would be useless if only laws deemed essential to a power's execution could be passed. Marshall also noted that the Necessary and Proper Clause is listed within the powers of Congress, not its limitations.

The Court held that the word "necessary" in the Necessary and Proper Clause does not refer therefore to the only way of doing something but applies to various procedures for implementing all constitutionally-established powers: "Let the end be legitimate, let it be within the scope of the



The text of the *McCulloch v. Maryland* decision, as recorded in the minutes of the Supreme Court

Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."^[15]

That principle had been established many years earlier by Alexander Hamilton:^[16]

[A] criterion of what is constitutional, and of what is not so ... is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality. ...

Chief Justice Marshall also determined that Maryland could not tax the bank without violating the constitution since, as Marshall commented, "the power to tax involves the power to destroy". The Court thus struck down the tax as an unconstitutional attempt by a state to interfere with a federal institution, in violation of the Supremacy Clause.^[17]

The opinion stated that Congress has implied powers, which must be related to the text of the Constitution but do not need to be enumerated within the text.

Significance

The case was a seminal moment in federalism: the formation of a balance between federal powers and state powers. Marshall also explained in the case that the Necessary and Proper Clause does not require all federal laws to be necessary and proper and that federal laws that are enacted directly pursuant to one of the expressed, enumerated powers granted by the Constitution do not need to comply with the Necessary and Proper Clause, which "purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted."

Criticism

Though Marshall rejected the Tenth Amendment's provision of states' rights arguing that it did not include the word "expressly," unlike the Articles of Confederation, which the Constitution replaced,^[18] controversy over the authority of the amendment being violated by the decision has existed. Compact theory also argues that the federal government is a creation of the states and that the states maintain superiority. Unlike Marshall, his successor, Roger B. Taney, established dual federalism by which separate-but-equal branches of government are believed to be a better option.^[19]

Later history

McCulloch v. Maryland was cited in the first substantial constitutional case presented before the High Court of Australia in *D'Emden v Pedder* (1904), which dealt with similar issues in the Australian Federation. While recognizing American law as not binding on them, the Australian Court nevertheless determined that the *McCulloch* decision provided the best guideline for the relationship between the Commonwealth federal government, and the Australian states, owing in large part to strong similarities between the American and Australian constitutions.

See also

- List of United States Supreme Court cases, volume 17
- List of landmark court decisions in the United States
- Case of Sutton's Hospital (1612) 77 Eng Rep 960
- Gibbons v. Ogden

References

Explanatory footnotes

- In the original report of the case, its name is styled *M'Culloch v. The State of Maryland et al.*, which has led many sources to refer to the case as *M'Culloch v. Maryland*.^[1] However, 18th- and early 19th-century printers often used an upside-down or "turned" comma to represent a superscript lowercase "c" after a capital "M"; in other words, they used M^ˆ to represent M^c. The original reporter of the case, Henry Wheaton, almost certainly used *M'Culloch* to indicate *McCulloch*. Today, many casebooks and legal treatises have accordingly updated "*M'Culloch*" to "*McCulloch*".^[2]
- The case refers to him as "McCulloch" because the court clerk misspelled his name.^[9]

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Second Reply to Hayne

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Daniel Webster's Second Reply to Hayne, January 26-27, 1830 –

Brief, Edited Excerpts (1.20.25) – For Presentation at “Recovering Daniel Webster” CLE

Mr. President. – In the course of my observations the other day, I paid a passing tribute of respect to a very worthy man, Mr. Nathan Dane of Massachusetts. He drew the Ordinance of 1787, for the government of the Northwestern territory. That Ordinance prohibits slavery, in all future times, northwest of the Ohio. It is a measure of great wisdom and foresight, and one which had been attended with highly beneficial and permanent consequences. I suppose that on this point, no two gentlemen of the Senate could entertain different opinions. But the simple expression of this sentiment has led the gentleman from South Carolina, not only into a labored defense of slavery, in the abstract, and on principle, but also into a warm accusation against me as having attacked the system of domestic slavery now existing in the southern states.

The gentleman argues that slavery, in the abstract, is no evil. Most assuredly I'd need not say I differ with him on that point. I regard domestic slavery as one of the greatest evils, both moral and political. But whether it be a malady, and whether it be curable, and if so, by what means; or on the other hand, whether it be the incurable wound of the social system, I leave to those whose right and duty it is to inquire and to decide.

The Union itself is too full of benefit to be hazarded in propositions for changing its original basis. I go for the Constitution as it is and for the Union as it is. But I am resolved not to submit in silence to accusations either against myself individually or against the North, wholly unfounded and unjust; accusations which impute to us a disposition to evade the Constitutional compact, and to extend the power of the government over the internal laws and domestic condition of the states.

I understand the honorable gentleman from South Carolina to maintain, that it is a right of the state legislatures to interfere, whenever, in their judgment, this government transcends its Constitutional limits, and to arrest the operation of its laws.

I understand him to insist, that, if the exigency of the case, in the opinion of any state government, require it, such state government may by its own sovereign authority, annul an act of the general government which it deems plainly and palpably unconstitutional.

I call this the South Carolina doctrine only because the gentleman himself has so denominated it.

In another of the South Carolina addresses, having premised that the crisis requires “all the concentrated energy of passion,” an attitude of open resistance to the laws of the Union is advised. And its authors further say, that, appealing with confidence to the Constitution itself to justify their opinions, they cannot consent to try their accuracy by the courts of justice. In one sense, indeed, Sir, this is assuming an attitude of open resistance in favor of liberty. But what sort of liberty? The liberty of placing their own opinions above the judgment of all others, above the laws and above the Constitution. This is their liberty.

I must now beg to ask, Sir, whence is this supposed right of the states derived? Where do they find the power to interfere with the laws of the Union? Sir, the opinion which the honorable gentleman maintains is a notion founded in a total misapprehension of the origin of this government, and of the foundation on which it stands. I hold it to be a popular government, erected by the people; those who administer it, responsible to the people; and itself capable of being amended and modified, just as the people may choose it should be. It is as popular, just as truly emanating from the people, as the state governments. It is created for one purpose; the state governments for another. It has its own powers; they have theirs; there is no more authority with

them to arrest the operation of a law of Congress, than with Congress to arrest the operation of their laws. This government, Sir, is the independent offspring of the popular will. It is not the creature of state legislatures; nay, more, if the whole truth must be told the people brought it into existence, established it, and have hitherto supported it, for the very purpose, amongst others, of imposing certain salutary restraints on state sovereignties. The states cannot now make war; they cannot contract alliances; they cannot make, each for itself, separate regulations of commerce; they cannot lay imposts; they cannot coin money.

Sir, the people have wisely provided, in the Constitution itself, a proper, suitable mode and tribunal for settling questions of Constitutional law, by declaring that “the Constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.”

This, Sir was the first great step. By this the supremacy of the Constitution and the laws of the United States is declared. The people so will it. No state law is to be valid which comes in conflict with the Constitution or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, Sir, the Constitution itself decides also, by declaring, “that the judicial power shall extend to all cases arising under the Constitution and laws of the United States.” These two provisions cover the whole ground. They are, in truth, the keystone of the arch. With these it is a government; without them it is a confederation.

Sir, I repeat, how is it that a state legislature acquires any power to interfere? Could anything have been more preposterous, than to make a government for the whole Union, and yet leave its power subject, not to one interpretation, but to 13 or 24 interpretations? Direct collision, between force and force, is the unavoidable result of that remedy for the revision of unconstitutional laws

which the gentleman contends for. It must happen in the very first case to which it is applied. Is not this the plain result? To resist by force the execution of a law generally, is treason. Talk about it as we will, these doctrines go the length of revolution. They are incompatible with any peaceable administration of the government. They lead directly to disunion and civil commotion.

But, Sir, although there are fears, there are hopes also. The people have preserved this, their own Constitution, for 40 years, and have seen their happiness, prosperity, and renown grow with its growth, and strengthen with its strength. Overthrown by direct assault, it cannot be; evaded, undermined, nullified, it will not be, if we, and those who shall succeed us here, as agents and representatives of the people, shall conscientiously and vigilantly discharge the two great branches of our public trust, faithfully to preserve, and wisely to administer it.

While the Union lasts, we have high, exciting, gratifying prospects spread out before us, for us and our children. When my eyes shall be turned to behold for the last time the sun in heaven, may I not see him shining on the broken and dishonored fragments of a once glorious Union; on states dissevered, discordant, belligerent; on a land rent with civil feuds, or drenched, it may be, in fraternal blood! Let their last feeble and lingering glance rather behold the glorious ensign of the Republic, now known and honored throughout the earth, still full high advanced, its arms and trophies streaming in their original luster, not a stripe erased or polluted, nor a single star obscured, bearing for its motto, no such miserable interrogatory as "What is this all worth?" nor those other words of delusion or folly, "Liberty first and Union afterwards"; but everywhere, spread all over in characters of living light, blazing on all its ample folds as they float over the sea and over the land and in every wind under the whole heavens, that other sentiment, dear to every true American Heart, -- liberty and Union, now and forever, one and inseparable!

(1,372 Words)

Commonwealth v. Frank Knapp

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The Knapp Murder Prosecution of 1830 in Salem, Massachusetts

On April 6th of 1830 Captain Joseph White, aged 82, was murdered in his bedroom by a blow to the head with a blunt instrument and stab wound to his chest. Captain White was in his home at 128 Essex Street in Salem that evening asleep in his bedroom. The house at 128 Essex Street still stands and is known today as the Gardner-Pingree House. Captain White was not a well-liked man. He was extremely wealthy from having benefited from Salem, Massachusetts' status as one of the most important ports in early America. Merchant ships were not as large in the late 1700's and early 1800's as they later would become and Salem was an ideal port for smaller merchant ships. The town prospered and some seafaring families grew rich. Captain Joseph White, in particular, became very wealthy. This was due in part by his participation in the slave trade.

Captain White had a favorite nephew and adopted son named Steven White. Steven was a Salem merchant and state senator who also happened to be the brother-in-law of Judge Joseph Story. Story was one of Daniel Webster's closest friends and Webster's son, Fletcher Webster, would later marry Steven White's daughter, Caroline, in 1836.

Captain Joseph White's fortune was assumed to be inherited by Steven White but the Captain also had a niece named Mary Beckford who lived with him at the Essex Street mansion. Beckford's daughter, also named Mary, had once been apart of the household, but three years earlier had married young Joseph Knapp, Jr. Knapp was previously the master of a sailing vessel that White had owned. Captain White was angry at the marriage of his niece's daughter to Joseph Knapp and fired Knapp. Captain White became estranged from his niece's daughter when he learned of the marriage.

This became an issue for the Beckford's and the Knapps because Captain White's enormous fortune would most certainly pass entirely to Steven White and leave them left out. Joseph Knapp, Jr., decided to steal Captain White's Will from a strong box in his bed chamber so that he would die intestate and Mary Beckford, unaware of his plot, would inherit an intestate share of his estate. What Joseph Knapp, Jr., did not know was that Captain White had executed another Will and left it in the care of his lawyer some blocks away.

On the evening of April 6, 1830, the light of a full moon shown through the windows of 128 Essex Street when Captain White retired to his bed chamber at approximately 9:40 pm. He was found the next morning lying on his right side diagonally across his bed with a crushing blow having been delivered to his left temple and thirteen stab wounds in the area of his heart. The body was already growing cold. The iron box and its contents were intact, and no other valuables had been disturbed.

Captain White's nephew, Steven White, was initially considered a suspect but was soon ruled out because of a complete lack of evidence. Steven took charge of the investigation. The police force in Salem at the time was far from professional. He encouraged the appointment of a 27-man "Committee of Vigilance." The Committee was charged with conducting a comprehensive investigation to solve the murder. A break in the case came approximately a week after the murder when Steven White received a letter from a jailer 70 miles away in New Bedford, Massachusetts.

The letter said that an inmate named Hash had heard two brothers, Richard and George Crowninshield discussing their intent to steal Joseph White's iron chest. The Crowninshield brothers were disreputable members of a once proud and important Salem family. Richard Crowninshield was indicted for murder and his brother was charged as an accomplice.

A subsequent letter was received by the Committee of Vigilance from an individual who turned out to be John C.R. Palmer. Palmer told a tale that he had overheard George Crowninshield tell his brother Richard that John Knapp and his brother, Joe Jr., would pay them \$1,000 to murder Captain White. The Knapp brothers were arrested. Joe Knapp, Jr., confessed to his role in the murder plot to Reverend Henry Coleman after Coleman promised Joe immunity from prosecution in exchange for his testimony against Richard Crowninshield. Joseph Knapp, Jr., confessed that he had unbarred and unscrewed a window at Captain White's house before the murder allowing Richard Crowninshield to enter through the garden gate and climb through the unlocked window to murder Captain White.

On June 15, 1830, Richard Crowninshield committed suicide in the jail by hanging himself in his cell. He used two silk handkerchiefs tied to the bars of his cell window. At this time, the law in Massachusetts required conviction of the perpetrator of a crime in order to move forward with the prosecutions of any accessories. Richard Crowninshield had taken his own life before he could be hanged at the gallows in order to save his brother as well as the Knapp brothers. Upon learning of the suicide, Joseph Knapp, Jr., refused to testify and uphold his confession. The Massachusetts Attorney General convened a new grand jury that indicted the Knapps as principals rather than accessories to the murder. He did not want to allow Richard Crowninshield's success to allow the others to escape justice.

Steven White turned to Senator Daniel Webster to take over the prosecution of the case for the State. The rules of criminal procedure were far different in 1830 and, despite many issues with Webster being able to appear, such as his non-membership in the Massachusetts Bar, he was convinced to take the case, on the eve of trial, for the handsome fee of \$1,000 from Steven White.

The trial of Frank Knapp began on August 3, 1830. Joe Knapp, Jr., refused to testify about his confession and Webster made a stunning argument to the Court. Webster said that the confession could be used if Frank Knapp said he did not assent to the confession. This way, it could be used to impeach his testimony. On the other hand, if he did agree with the confession, which would be an admission of guilt, it could not be used. Webster gave his closing in the first trial on August 11th. It was in his summation that he used the famous phrase "there is no refuge from confession but suicide, and suicide is a confession." The trial resulted in a hung jury that was handed down by the jury on the next day. The speculation is that Captain Joseph White was so thoroughly disrespected in Salem for his temperament and history as a slaver that several jurors would not convict.

The second trial was held just three days later with the evidence being very similar to what had been presented the first time. There was a bit more emphasis on the forensic evidence of the case. This time, Daniel Webster gave a summation that is considered to be the greatest closing ever delivered in American Jurisprudence. More than 50 years later, Henry Cabot Lodge praised the summation by writing "I have studied this famous exordium with great care, and I have sought

diligently in the works of all great modern orators, and some of the ancients as well, for similar passages of higher merit. My quest has been in vain.” Edgar Allen Poe was influenced by the terms of Webster’s summation in the Knapp trial. Webster had described the utmost coolness and self-possession with which Dick Crowninshield had gone about his work. A very similar description is found in Poe’s fictional murderer of “The Tell Tale Heart.” The experience of watching Webster in this trial also affected Nathaniel Hawthorne in his works “The Scarlet Letter” and “The House of Seven Gables.”

The Knapp brothers were executed at the Salem Jail shortly after the trials had finished. George Crowninshield was released due to the fact that he had an alibi on the night of the murder and there was no real evidence implicating him as an active participant in the plot. The story of this murder case has largely disappeared from American history. This is primarily due to the fact that the proud old families of seafaring Salem did not want the negative publicity. Already looked down upon for their history with the witch trials, members of the Salem community did their best to eliminate and hide the details and connection to the sensational trial. Ironically, the Town of Salem now promotes its connection to all things sinister and occult, especially at Halloween time for economic reasons. In the present day, however, mention of the trial is mostly restricted to a note in the “Gardener-Pingree House” website mentioning it has the site of Captain Joseph White’s murder. It is only a matter of time before the history of this murder case rises in the public conscious. Undoubtedly, it will one day be part of an attempt to cash in on a new aspect of Salem’s macabre history. One positive outcome, however, would be recognition of the extraordinary trial skills of a most extraordinary lawyer, Daniel Webster.

March 7th Speech

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Daniel Webster's 7th of March Speech, 1850 – “the Constitution and the Union” –

Brief, Edited Excerpts (1.20.25) – For Presentation at “Recovering Daniel Webster” CLE

Mr. President, -- I wish to speak today, not as a Massachusetts man, nor as a Northern man, but as an American and a member of the Senate of the United States. It is fortunate that there is a Senate of the United States; a body not yet moved from its propriety, not lost to a just sense of its own dignity and its own high responsibilities, and a body to which the country looks, with confidence, for wise, moderate, patriotic, and healing counsels. It is not to be denied that we live in the midst of strong agitations, and are surrounded by very considerable dangers to our institutions and government. The imprisoned winds are let loose. The East, the North, and the stormy South combined to throw the whole sea into commotion, to toss its billows to the skies, and disclose its profoundest depths. I speak today for the preservation of the Union. “Hear me for my cause.” [I speak today, out of a solicitous and anxious heart for the restoration to the country of that quiet and that harmony which makes the blessings of this Union so rich, and so dear to us all.]

Now, Sir, upon the general nature and influence of slavery there exists a wide difference of opinion between the Northern portion of this country and the Southern. It is said on the one side, that, although not the subject of any injunction or direct prohibition in the New Testament, slavery is a wrong; that it is founded merely in the right of the strongest; and that it is an oppression, like unjust wars, like all those conflicts by which a powerful nation subjects a weaker to its will; and that, in its nature, whatever may be said of it in the modifications which have taken place, it is not according to the meek spirit of the Gospel. The South, upon the other side, having been accustomed to this relation between two races all their lives, from their birth, have been taught, in general, to treat the subjects of this bondage with care and kindness, and I

believe, in general, feeling great kindness for them, have not taken the view of the subject which I have mentioned. There are thousands of religious men, with consciences as tender as any of their brethren of the North, who do not see the unlawfulness of slavery.

Sir, when a question of this kind seizes on the religious sentiments of mankind, and comes to be discussed in religious assemblies of the clergy and laity, there is always to be expected, or always to be feared, a great degree of excitement. It is in the nature of man, manifested in his whole history, that religious disputes are apt to become warm in proportion to the strength of the convictions which men entertain of the magnitude of the questions at issue. In all such disputes, there will sometimes be found men with whom everything is absolute; absolutely wrong, or absolutely right. They see the right clearly; they think others ought so to see it, and they are disposed to establish a broad line of distinction between what is right and what is wrong. There are impatient men; too impatient to wait for the slow progress of moral causes in the improvement of mankind.

But we must view things as they are. Slavery does exist in the United States. It did exist in the States before the adoption of this Constitution, and at that time.

Mr. President, in the excited times in which we live, there is found to exist a state of crimination and recrimination between the North and South. There are lists of grievances produced by each; And those grievances, real or supposed, alienate the minds of one portion of the country from the other, exasperate the feelings, and subdue the sense of fraternal affection, patriotic love, and mutual regard. I will allude to the other complaints of the South, and especially to one which has in my opinion just foundation; and that is, that there has been found at the North, among individuals and among legislators, a disinclination to perform fully their Constitutional duties in regard to the return of persons bound to service who have escaped into the free States. In that

respect, the South, in my judgment, is right, and the North is wrong. Every member of every Northern legislature is bound by oath, like every other officer in the country, to support the Constitution of the United States; and the article of the Constitution which says to these States that they shall deliver up fugitives from service is as binding in honor and conscience as any other article. No man fulfills his duty in any legislature who sets himself to find excuses, evasions, escapes from this Constitutional obligation. When it is said [in the Constitution] that a person escaping into another state, and coming therefore within the jurisdiction of that state, shall be delivered up it seems to me the import of the clause is, that the state itself, in obedience to the Constitution, shall cause him to be delivered up.

And now, Mr. President, instead of speaking of the possibility or utility of secession, instead of dwelling in those caverns of darkness, instead of groping with those ideas so full of all that is hard and horrible, let us come out into the light of day; let us enjoy the fresh air of liberty and Union. Never did there devolve on any generation of man higher trusts than now devolve upon us, for the preservation of this Constitution and the harmony and peace of all who are destined to live under it. Let us make our generation one of the strongest and brightest links in that golden chain which is destined, I fondly believe, to grapple the people of all the States to this Constitution for ages to come. We have a great, popular, Constitutional government, guarded by law and by judicature, and defended by the actions of the whole people. No monarchical throne presses these States together, no iron chain of military power encircles them; they live and stand under a government popular in its form, representative in its character, founded upon principles of equality, and so constructed, we hope, as to last forever. In all its history it has been beneficent; it has trodden down no man's liberty; it has crushed no state. Its daily respiration is liberty and patriotism; its yet youthful veins are full of enterprise, courage, and honorable love of

glory and renown. Large before, this country has now, by recent events, become vastly larger. This republic now extends, with a vast breadth, across the whole continent. The two great seas of the world wash the one and the other shore. We realize, on a mighty scale, the beautiful description of the ornamental border of the buckler of Achilles:

“Now, the broad shield complete, the artist crowned
With his last hand, and poured the ocean round;
In living silver seemed the waves to roll,
And beat the bucklers verge, and bound the whole.”

(1,196 words)

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